NO. 83-459

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1983

WASHINGTON STATE CHARTERBOAT ASSOCIATION,

PETITIONER,

VS.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE,

RESPONDENT.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

MEMORANDUM IN OPPOSITION TO TRIBES' MOTION FOR LEAVE TO FILE AMICUS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Daniel D. Syrdal
SYRDAL, DANELO,
KLEIN & MYRE, P.S.
24th Floor
Fourth & Blanchard Bldg.
Seattle, Washington 98121
(206) 464-1490
Attorneys for Petitioner

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	ARGUMENT	3
	A. The Motion on Behalf of the Tribes is Disfavored Pursuant to Rule 36 of the Supreme Court Rules.	3
	B. The Motion for Amicus Status and the Accompanying Brief Set Forth No Reasons for Believing That Questions of Law or Fact Relevant to the Granting or Denial of the Writ of Certiorari Will Not Be Adequately Presented by the Parties.	5
	C. The Moving Tribes Misstate the Equities in This Case and Misrepresent the Effect That the Association's Requested Relief Would Have.	7
	D. The Moving Tribes' Arguments Regarding Res Judicata Are Without Merit and Should Not Be Considered When Determining Whether to Grant the Writ of Certiorari.	13

E. The Moving Tribes Misstate the Association's Arguments Regarding Abrogation. 16

III. CONCLUSION 17

TABLE OF CASES

	Page
Commissioner v. Sunnen, 333 U.S. 591 (1948)	15
Hoh v. Baldrige, 522 F. Supp. 683 (W. D. Wash. 1981)	6, 13-14
United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976)	9-10, 14
Washington v. Washington State Commercial Passenger Fishing Vessel Association, 433 U.S. 658 (1979)	13-16
Western Oil & Gas Association v. EPA, 633 F.2d 803 (9th Cir. 1980)	15

TABLE OF OTHER AUTHORITIES

U.S. Supreme Court Rule 36.1	3
U.S. Supreme Court Rule 36.3	5
Fisheries Conservation and Management Act, 16 U.S.C. §1801 et seq.	14

I. INTRODUCTION

On September 6, 1983, the Washington State Charterboat Association ("Association") filed and served its Petition for Writ of Certiorari. Citing the "press of business" the Secretary sought and was granted an extension of time to November 18, 1983 to respond to the petition. On November 16, 1983 the government was granted another extension, until December 2, 1983, in which to file its response.

On November 14, 1983, long after the 30 day period provided by this Court's rules for response to a Petition for Writ of Certiorari had expired, the moving tribes sought the Association's consent for them to participate as amici prior to consideration of the Petition for Writ of Certiorari. The Association informed counsel for the tribes that, while it would not object to their participation if certiorari were granted by this

Court, it did object to their participation prior to the Court's action on the Petition for Writ of Certiorari.

On November 17, the tribes filed a motion for leave to file as amici curiae, a brief in opposition and accompanied this motion with a "Brief for Amicus Curiae Tribes in Opposition." This memorandum is supplied in order to formally oppose this motion on the basis that the tribes' participation at this stage would only serve to obfuscate the issues properly before the Court for its determination on whether to grant the Petition. Their brief is simply another in a long line of attempts by the tribes to prevent judicial review of a fisheries allocation format which provides the tribes far more than their fair share of the fish resources subject to the Indian treaty right. The tribes' interest in the outcome of this

case can be fully protected through their participation as amici curiae if and when the case is reviewed on the merits by this Court.

II. ARGUMENT

A. The Motion on Behalf of the Tribes is Disfavored Pursuant to Rule 36 of the Supreme Court Rules.

Rule 36.1 of the Supreme Court rules provides that a motion for leave to file a brief of an amicus curiae prior to consideration of the Petition for Writ of Certiorari is not favored where consent has been refused. The moving tribes have provided no rationale whatsoever for the Court to disregard this general rule disfavoring such motions. Their participation at this stage is not necessary to assure the consideration of their view since, if the writ of certiorari is granted, the Association has already indicated it will not oppose their amici participation if the case is heard on

the merits. The tribes' motion to obtain amici status at this point is simply an attempt to confuse the issues presented by this Petition in the hopes that the Court will not grant review on the merits, and thus deprive the petitioner of an opportunity to have the Court resolve issues critical to the survival of the coastal sports fishing industry, and the social and economic well-being of the coastal communities, of the State of Washington.

This motion and its accompanying brief serve as good examples of the need for the general rule disfavoring such motions. While they never deny that the current allocation format assures that they will be allowed to harvest more than half the salmon stocks subject to the treaty right, the tribes characterize the issues as having already been settled by prior litigation and present the facts in an incorrect or

misleading fashion in a clear attempt to persuade this Court to deny review while the case is in a posture that makes a reply to these contentions very difficult. The general rule disfavoring amicus briefs at this stage was most probably designed to avoid the very type of actions taken by the tribes in this case.

B. The Motion for Amicus Status and the Accompanying Brief Set Forth No Reasons for Believing That Questions of Law or Fact Relevant to the Granting or Denial of the Writ of Certiorari Will Not Be Adequately Presented by the Parties.

Rule 36.3 of the Supreme Court rules provides that motions for leave to file an amicus curiae brief when a case is being heard on the merits by the Court must precisely state the reasons for believing that the amicus applicant's interest will not be protected by the existing parties. The standard

for amicus participation prior to consideration of the Petition for Writ of Certiorari should be at least as strong as indicated by the fact that motions subsequent to granting the writ are not disfavored as are motions made prior to consideration of the Petition. The tribes provide no rationale as to why the Secretary will not adequately protect their interests with respect to whether the writ should be granted. There is, therefore, no reason to believe the interests of the tribes are not adequately represented at this point.[1]

---

[1]In paragraph 2 of their motion the tribes do indicate that they are indispensable to the litigation. This, of course, does not mean they are indispensable to the question as to whether the Court should grant the Association's Petition in this case. The Association agrees that the tribes should have a right to participate in review on the merits since their interests are definitely involved in this case. However, it should be pointed out that the tribes have consistently taken the opposite position vis-a-vis the Association. In the case of Hoh v. Baldrige, 522 F. Supp. 683 (W. D. Wash. 1981), the tribes sought to have the 1981 non-Indian ocean fishing season terminated.

C. The Moving Tribes Misstate the Equities in This Case and Misrepresent the Effect That the Association's Requested Relief Would Have.

In their motion for leave to file an amicus brief and the accompanying brief, the tribes repeatedly assert that the Association is seeking to readjudicate and alter the most important treaty secured rights of the moving tribes, said to be their right to fish in their traditional reservation homeland fishing locations.

The tribes assert that acceptance of the Association's position regarding

---

In spite of the dramatic adverse impact on the Association's members this relief would have caused, and the fact that the Association moved almost immediately to intervene, the tribes vigorously opposed such intervention. Additionally, it must be noted that the tribes moving for amicus status have continually asserted their sovereign immunity from suit and thus have not been available as parties in litigation by the Association.

allocation could "disenfranchise" some tribes of their traditional fisheries, and, given the 1981 situation, "would have denied the Hoh tribe its fishery altogether, while some other tribe would have been allowed a greater catch to maintain an 'aggregate' sharing balance."

This argument on behalf of the tribes constitutes a misrepresentation of the facts in an effort to portray an inequitable result to the tribes. The Association certainly does not seek to alter the tribes' right to fish at their usual and accustomed fishing grounds.[2] Even though the 1981 situation would have severely limited the Hoh

---

[2]It should be noted that the treaties involved in this case secure a right to fish at usual and accustomed fishing grounds, not at a much more limited reservation area. However, the record in this case demonstrates that an aggregation theory as suggested by the Association will not deprive any of the tribes moving for amicus curiae status of their right to fish in usual and accustomed fishing grounds in general or on their reservation.

tribes' fishery on coho salmon, that tribe would have received more than 50% of the other salmon stocks returning to the Hoh river, with an aggregate total of fish caught on the reservation of more than 50% of the harvestable numbers available. In fact, the agreed facts derived from the Secretary's own record upon which this case was tried demonstrate that, under any foreseeable circumstances, each tribe will be able to obtain their aggregate 50% share of the harvest without leaving their own separate reservation fisheries.[3]

---

[3]Even if the tribes did occasionally have to leave their reservations to harvest their fair share of the resource, this opportunity is available to them as it was, in fact, their historical approach to fish in a much wider geographic area. Footnote 1 at page 3 of the moving tribes' brief contends that the tribes do not have co-terminus treating fishing rights. This contention is simply incorrect. The decision in U.S. v. Washington which set forth the extent of the usual and accustomed fishing grounds for each of these tribes demonstrates the largely co-terminus nature thereof with each tribe having usual and accustomed fishing grounds

While grossly overstating any effect the Association's proposed method of allocation would have on the tribes, the moving tribes go on to totally misrepresent the impact that the underlying decisions have had on the economic well-being of the Association. It is important to note that the moving tribes nowhere dispute the fact that the run-by-run allocation method currently being used by the Secretary provides them more than 50% of the harvest of fish which would otherwise return to their usual and accustomed fishing grounds and stations. The Association's brief in support of its Petition for Writ of Certiorari sets forth the inequities involved in this unequal sharing. However, the impacts on the

---

throughout the north coastal area. U.S. v. Washington, 384 F. Supp. 312, 359, 372-74 (W.D. Wash. 1974).

Association are much greater than those caused by the unequal sharing of coastal stocks. The requirement to stop ocean fishing on other, much stronger stocks in the mixed-stock ocean fishery when necessary to provide a 50% return of the harvestable numbers of the weakest coastal stock to the coastal tribes causes a tremendous loss of ocean harvest on these stronger stocks. While the tribes point out at page 11 of their brief that there was no reduction in the Association's fishery in 1981, that is only because the spawning escapement goals were reduced for that year. Not only does this pose a threat to future harvests, but if an aggregate approach had been utilized with these lowered escapement goals, the Association's harvest in the ocean in 1981 could have been much larger.

In years subsequent to 1981 the Association's season has been dramatically

reduced along with its ocean harvest quota. These reductions have been necessitated by the run-by-run allocation approach dictated by the courts below. The fact, cited by the tribes at pages 11 and 12 of their brief, that the Association was allowed a 66% share of the non-Indian ocean catch this year is totally irrelevant to the harm caused to the Association by the decisions below. The Association's greater share of the non-Indian ocean harvest was unrelated to treaty allocation and is still smaller than the Association's historic 40% share of the harvest that would have been allowed without run-by-run management.

It is simply incongruous for the tribes, after fighting so hard to achieve recognition of their rights to 50% of the harvest, to claim there is no injustice in a situation which denies the non-Indian fisher-

men their rights to at least 50% of the harvest as enunciated by this Court in Washington v. Washington State Commercial Passenger Fishing Vessel Association, 433 U.S. 658 (1979) (hereinafter "Fishing Vessel").

D. The Moving Tribes' Arguments Regarding Res Judicata Are Without Merit and Should Not Be Considered When Determining Whether to Grant the Writ of Certiorari.

The moving tribes, as has been the case in all the prior litigation, have attempted to paint this case as one which has been fully litigated in the past. The tribes made the same arguments regarding res judicata at both the district court and court of appeals levels in this case. Both courts rejected the same.[4]

---

[4]The tribes at page 5 of their brief again refer to the Ninth Circuit language that the Association's attempt to intervene in the Hoh v. Baldrige case was a "thinly veiled effort by the Association to relitigate issues that have previously been decided." The tribes fail to mention in

As set forth in the Petition for Writ of Certiorari at pages 22-25, it is simply incorrect that the Fishing Vessel case has previously considered the issues surrounding the relationship between Indian treaty fishing rights and the Fisheries Conservation and Management Act's statutory standards pursuant to which the Secretary is required to regulate the ocean salmon fishery off the coast of Washington. Nor did the court in Fishing Vessel establish an immutable principle relating to harvest allocation necessary to comply with the basic fair share principle established in that case.[5]

---

their brief, however, that there was no argument presented on the merits to the Ninth Circuit at that time and thus the Ninth Circuit did not even have the benefit of argument on the issues to be raised by the Association. They also failed to note that the Ninth Circuit did not accept its argument regarding res judicata once the matter was heard on it merits in the case below.

[5]Had it done so, many of Judge Boldt's rulings in U.S. v. Washington which set forth various harvest allocation formats

Even the Secretary admitted in his trial brief below that the issues presented by the Association have not been previously adjudicated.

Even had this Court adjudicated the issues of this case in Fishing Vessel, reconsideration at this time would not be precluded. See Commissioner v. Sunnen, 333 U.S. 591, 599 (1948); Western Oil & Gas Association v. EPA, 633 F.2d 803, 809 (9th Cir. 1980). The Fishing Vessel case dealt with Washington territorial waters and there was no real understanding of how run-by-run management would apply to an ocean fishery. The factual situation regarding the mixed stock ocean fishery has been substantially clarified since the initiation of federal

---

based on the particularities of each situation, and were approved in Fishing Vessel, would be in violation of any such specific requirement.

management under the FCMA, and new factual and legal considerations which would justify reconsideration are very apparent. The most important of these considerations is the fact, not denied by the tribes, that run-by-run management, if indeed required by this Court's decision in Fishing Vessel, has proven to result in an unequal sharing of the resource such that the non-Indian fishermen cannot harvest his at least 50% share.

E. The Moving Tribes Misstate the Association's Arguments Regarding Abrogation.

At page 9 of their brief, the moving tribes contend that the Association's argument somehow asserts that fish caught by the amicus curiae tribes in their traditional river fishery or by other non-Indian groups fishing in the "inside" waters of Washington, "somehow do not contribute to the 'optimum yield.'" Again, the tribes are attempting to confuse the issues presented in this case in

order to have the petition denied. A review of the arguments set forth in the Petition at page 41 sets forth the Association's position that it is the extremely large transfers of harvest to foreign fisheries caused by run-by-run allocation in the mixed-stock ocean fishery that constitutes an impermissible variation from the pre-eminent national standard requiring optimum yield to domestic fishermen.

III. CONCLUSION

The tribes' arguments presented in their motion for leave to file an amicus brief and in the accompanying brief are an attempt to divert this Court from the very important issues presented by this case. The motion attempts to avoid review by this Court and thus maintain a patently unfair situation in which the non-Indian fishermen must not only forego a very substantial harvest on

non-treaty stocks but must also provide the tribes much more than 50% of the aggregate of the harvest from stocks subject to the treaty right. The tribes have shown no reason for this Court to vary from the rule disfavoring such motions, and the motion should be denied.

DATED this 28th day of November, 1983.

SYRDAL, DANELO,
KLEIN & MYRE, P.S.

By Daniel D. Syrdal
Daniel D. Syrdal
Attorneys for Petitioner